No. 71-

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES, ET AL., PETITIONERS

v.

ROBERT W. PARKER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
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The Solicitor General, on behalf of the United States and the federal petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinions of the district court (Pet. App. C, *infra*), is reported at 309 F. Supp. 593. The opinion of the court of appeals (Pet. App. A, *infra*) is reported at 448 F. 2d 793.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on October 1, 1971. On December 23, 1971, Mr. Justice White extended the time within which to file a petititon for a writ of certiorari to

January 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 3(b) of the Wilderness Act of 1964 precludes the Secretary of Agriculture from managing lands having wilderness value contiguous to existing "primitive" areas according to the standards established and duties imposed by the Multiple-Use Sustained-Yield Act of 1960.

STATUTES INVOLVED

Sections 3(a) and (b) and 4(a)(1) of the Wilderness Act of September 3, 1964, 78 Stat. 890, 16 U.S.C. 1132(a) and (b), and 1133(a)(1), provide:

> NATIONAL WILDERNESS PRESERVATION SYSTEM—EXTENT OF SYSTEM
>
> SEC. 3. (a) All areas within the national forests classified at least 30 days before the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness", "wild", or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall—
>
> (1) Within one year after the effective date of this Act, file a map and legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate and the House of Representatives, and such descriptions shall have the same force and effect as if included in this Act: *Provided, however,* That correction of clerical and typographical errors in such legal descriptions and maps may be made.
>
> (2) Maintain, available to the public, records pertaining to said wilderness areas, including

maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors, and forest rangers.

(b) The Secretary of Agriculture shall within ten years after the enactment of this Act, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one-third of all the areas now classified as "primitive" within three years after the enactment of this Act, not less than two-thirds within seven years after the enactment of this Act, and the remaining areas within ten years after the enactment of this Act. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on the effective date of this Act shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act until Congress has

determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. Notwithstanding any other provisions of this Act, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

USE OF WILDERNESS AREAS

SEC. 4. (a) The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which

> national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

Section 2 of the Multiple Use-Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 529, provides:

> The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title

STATEMENT

On April 15, 1969, following a ten-year study which concluded that the area was more suitable for timber harvesting than wilderness use, the Forest Service entered into a contract with Kaibab Industries for the sale of 4.3 million board feet of timber in the East Meadow Creek Region of White River National Forest in Colorado, an area contiguous to the 61,000-acre Gore Range-Eagles Nest Primitive Area (C.A. App. 245, 246; [1] Pet. App. 15a–17a). The town of Vail, Colorado, a number of its residents and property owners, and three conservation groups brought the present suit to enjoin the Secretary of Agriculture and the Forest Service from consummating the contract.

[1] "C.A. App." refers to the appendix in the court of appeals.

At trial,[2] the forestry official in charge of wilderness studies for the area, Mr. Weidenhoff, testified that in his opinion East Meadow Creek did not qualify for inclusion in the wilderness system (C.A., App. 402). The Regional Forester, Mr. Nordwall, testified that in 1968, after reviewing recommendations submitted by his staff, he decided not to recommend that East Meadow Creek be designated as part of the wilderness system, because he concluded that it was more suitable for timber harvesting (C.A. App. 257–258). The formal report of the Secretary of Agriculture on the Gore Range-Eagles Nest Primitive Area under the Wilderness Act, dated November 2, 1971, adopted the recommendations of the staff in concluding that East Meadow Creek was more suitable for multiple-use purposes.

The Forest Service's conclusion that the area was more suitable for timber harvesting rested upon the following factors: The existence of a presently overgrown access road, running into the center of the region, which had been built as part of a program to combat beetle infestation; the area's proximity (less than two miles) to two previous timber sales; the

[2] The government originally moved for summary judgment on the ground that decisions relating to timber sales outside of existing primitive areas are matters Congress has committed to agency discretion under the Multiple-Use Act and, consequently, are not judicially reviewable. While the district court agreed that timber sales fall within the discretion of the Forest Service, the court denied the motion on the ground that the question whether this area was so "clearly wilderness" as to require Secretarial study should be determined after a trial. 307 F. Supp. 685, 688.

existence in the area of 14 mining claims; plans of the Denver Water Board possibly to locate a water diversion project there; and the fact that the area is surrounded on three sides by six privately owned parcels (Pet. App. 18a). These factors, the Forest Service determined, not only disqualified the area under the Wilderness Act's "untrammeled by man" standard, but made East Meadow Creek more suitable for timber harvesting than for wilderness use.

After trial, the court ruled that East Meadow Creek "seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value." 309 F. Supp. at 601; Pet. App. 29a. Relying on Section 3(b) of the Wilderness Act which provides in part,

> Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress * * * the addition of any contiguous area of national forest lands predominantly of wilderness value. * * *

the court held that the Forest Service must study the area and include it in its wilderness report, and enjoined the Forest Service from any acts, such as timber sales, which would irrevocably change the region's character until the President and Congress have made the ultimate decision on whether to include it in the wilderness system.

The court of appeals affirmed, holding (448 F. 2d at 797; Pet. App. 9a):

> The trial court, *having determined as a fact that the East Meadow Creek Area had predominantly wilderness value* which should be pre-

served for consideration at the executive and congressional level, was completely justified in directing inclusion of a study of the area in the mandated report to the President. This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper. [Emphasis added.][3]

REASONS FOR GRANTING THE WRIT

Contrary to the expectations of Congress, the courts below turned the permissive language of Section 3(b) of the Wilderness Act into a mandate that no lands with wilderness qualities contiguous to "primitive" areas be used for other purposes until the President and Congress have passed on their wilderness value. Under this interpretation of the Act, the Secretary of Agriculture would be prevented from discharging his duties under the Multiple Use-Sustained Yield Act of 1960 to manage an estimated 4.75 million acres (nation-wide) of forest land, despite the express language of Section 4(a) of the Wilderness Act that "Nothing in this Act shall be deemed to be in interference with" the earlier law.[4] The case therefore warrants review by this Court.

[3] As noted, *supra*, p. 7, the district court found only that this area "seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value."

[4] While under Section 3(b) of the Wilderness Act the Secretary is to report his findings to the President within ten years of the Act's enactment in 1964, the impact of the decision below will not terminate in 1974. The Secretary is enjoined until both the President and Congress act. There are presently pending before Congress the Secretary's recommendations with respect

I. a. The Wilderness Act of 1964 established a new statutory classification of wilderness lands which are to be permanently retained in their natural state. Fifty-four previously protected areas, comprising more than nine million acres, became part of the wilderness system on the effective date of the Act. The remaining 34 areas previously designated as primitive, consisting of 5,477,740 acres, were left for further study. Congress directed the Secretary of Agriculture to study these 34 primitive areas and within ten years make his recommendations with respect to their inclusion in the wilderness system to the President and Congress. 1964 U.S. Code Cong. & Admin. Serv. 3626.

The reason for requiring further study—instead of immediately including those primitive areas in the wilderness system—was the realization that the Forest Service had overdrawn some of the previously protected areas in order to ensure the inclusion of all land which might upon further study be found to qualify as having primitive conditions. 107 Cong. Rec. 18364. The review was undertaken "so that any portion having merchantable timber or being more susceptible to multiple use would be excluded, and the remainder not susceptible to merchantable use, would be retained" (remarks of Senator Church, 107 Cong. Rec. 18374).

The legislative history of the Act shows that the intention of Congress was not to add new lands to

to seven primitive areas, one submitted in 1967, four in 1968, one in 1969 and one (Gore Range-Eagles Nest Primitive Area) in 1971.

those already removed from multiple use management, but rather that the Act's impact was to be solely upon lands already as removed. Thus, in the report of the Senate Committee on Interior and Insular Affairs to accompany S. 4, which became the Wilderness Act (Sen. Rept. No. 109, 88th Cong., 1st Sess.), the Committee states (p. 2):

> As reported [in connection with a previous wilderness bill passed by the Senate in 1961] * * *, the Wilderness Preservation System can be established without affecting the economic arrangements of communities, counties, States or business enterprises *since the areas are already withdrawn*, or because existing private rights and established uses are permitted to continue. *There will be* no withdrawal of lands from the tax base of counties or communities; *no withdrawal of timberlands* on which lumbering operations depend, nor any withdrawal of present grazing or mining rights. [Emphasis added.]

The Senate Report adds (p. 4):

> A second development since the previous report was filed is increased understanding and agreement that S. 4 does not "sterilize," "quarantine," nor "lock up" a vast new 60-million acre area of Federal lands, but involves *lands previously restricted in use* by laws creating our national parks, by establishment as wildlife areas, or *by national forest classification.* [Emphasis added.]

Congressman Saylor, who played a leading role in the House management of the bills which became the

Wilderness Act, stated with respect to the study which the Act directed to be undertaken:

> [T]his review relates only to the lands that Congress by the Act says are to be considered, and *all these lands are now in some kind of administrative status as wilderness.* [109 Cong. Rec. 11929 11930; see also 107 Cong. Rec. 18370; emphasis added.]

Likewise in the Senate, Senator Kuchel, made it clear that the Act and the study it directed would affect only lands already withdrawn from multiple use:

> I want to recall something which the able chairman of the Senate Committee on Interior and Insular Affairs, Senator Anderson of New Mexico, said when he spoke in the Senate last month. Senator Anderson said in part * * *:
>
> "There is a very sound reason for drawing a line between handling of areas already reserved and any new areas.
>
> "Inclusion of the wild, wilderness, primitive, park, and wildlife areas in the wilderness preservation system will cause little or no disturbance of individuals, communities, or economic patterns. *The areas have been withdrawn for years. There have been no timber sales from forest lands involved* so there are no lumber mills dependent on them which will have to close down. Established mining operations and grazing will not be disturbed.
>
> "There is thus virtually no change in the status quo of the areas to be handled under the

> presidential recommendations procedure in the bill. The bill simply makes wilderness preservation a statutory directive and responsibility of the existing land administering agency in its handling of already reserved lands."
>
> Mr. President, that explanation by the committee chairman is important. It is important for the Senate to understand that the lands under the jurisdiction of the Department of Agriculture and I speak of it particularly that will be affected by this bill are *those lands which, in his executive discretion, the Secretary of Agriculture has already determined shall be set aside as wilderness, wild, primitive, or canoe areas.* [Emphasis added; 107 Cong. Rec. 18370; see also 107 Cong. Rec. 18371, 18366 18367.]

Senator Church explained that the purpose of the ten-year review was "to separate out from these primitive areas any portion found to be more suitable for multiple use" (107 Cong. Rec. 18366; see also 107 Cong. Rec. 18046).

To the same effect are the remarks of Senator Morse (107 Cong. Rec. 18353); Senator Hart (107 Cong. Rec. 18391); Senator Kuchel (107 Cong. Rec. 18370); and Senator Murray (106 Cong. Rec. 15471).

Senator Humphrey introduced the original wilderness bill (S. 4013) in 1956, 84th Cong., 2d Sess., and along with other Senators reintroduced it as S. 1123 in 1959, 86th Cong., 1st Sess. Senator Humphrey stated that the latter bill would not injure commercial interests and that, for example, the bill "does not give wilderness status to a single acre of forest land now available for timber production" (105 Cong. Rec. 2637). In supporting these bills, the Wilderness Society, too, sought to

b. Ever since the enactment of the Organic Administration Act of 1897, 30 Stat. 35, Congress has authorized the Secretary of Agriculture "to regulate [the] occupancy and use" of national forests. 16 U.S.C. 551. And Congress has expressly specified the purposes for which national forests will be created—to "improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber * * *." 16 U.S.C. 475. The Secretary has specific authority, in his discretion, to sell national forest timber. 16 U.S.C. 476. The Multiple-Use Sustained-Yield Act of 1960 directs him to balance the potential uses of national forest lands—"outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (16 U.S.C. 528)—in a manner "that will best meet the needs of the American people." 16 U.S.C. 531(a).

In keeping with the legislative history previously discussed, Section 4(a) of the Wilderness Act (16 U.S.C. 113(a)(1)) reflects the congressional intention neither to nullify nor to supersede the provisions of the Multiple-Use Act by declaring:

> The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units

allay misgivings of commercial users of the forests. Mr. Howard Zahniser, its Executive Director, stated: "No lands affected by it [the Wilderness Bill] are now available for timber cutting" (104 Cong. Rec. 6778). See also 103 Cong. Rec. 1065; 104 Cong. Rec. 7970.

of the national park and national wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

The decision below, we submit, stands this congressional intent on its head. Instead of permitting the release of lands suitable for multiple use, including timber harvesting, it withdraws additional lands theretofore available for such multiple use.[6]

2. General application of the holding below would seriously disrupt the management for multiple use of millions of acres of forest lands committed to the discretionary management of the Department of Agriculture by the Multiple-Use Sustained-Yield Act of

[6] The court's reliance (Pet. App. 8a-9a) on a provision in the Forest Service Manual, FSM 2321(1), which directs the study of "contiguous lands which seem to have significant wilderness resources," as creating a duty to further study the affected area, is misplaced. The FSM provision is, not, as claimed, a regulation, but only an in-house directive. Moreover, it must be read in context with other provisions which direct attention to other considerations, *i.e.*, availability (FSM 2321.12) and need (FSM 2321.13). The complete directive, therefore, calls for comparative analysis of wilderness assets and liabilities, together with weighing multiple-use considerations—precisely the kind of study undertaken before it was decided to sell timber in the East Meadow Creek area (*supra*, p. 6).

1960. The decision would require the Forest Service to make no use of any forest lands having wilderness value contiguous to established primitive areas (an amorphous concept at best that would be exceedingly difficult to apply) until the President and Congress have acted with respect to those areas. The Department of Agriculture has estimated that of the 27 primitive areas upon which Congress has not acted, 24 have contiguous national forest lands of wilderness value, covering an estimated 4.75 million acres. General appplication of the holding below would prohibit the Forest Service from using any of these lands for parklands, camping areas, and wildlife and fish purposes as well as timber harvesting. Timberlands cover more than half of the 4.75 million acres of such contiguous land. The estimated timber stand on such contiguous areas is 26 billion board feet. Based upon current cutting allowances derived from prudent timber management practices, this would support an annual cut of approximately 351 million board feet. While that figure constitutes only 3 percent of the nationwide cutting allowance for the national forest system, the impact upon some states and localities of barring timber sales from these lands would be much greater. For instance, the allowable cut in Trinity National Forest could be reduced an estimated 25 percent. Some communities, dependent upon lumber, would be likely to be essentially deprived of Forest Service timber sales.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

[Filed, United States Court of Appeals, Tenth Circuit, Oct. 1, 1971, Howard K. Phillips, Clerk]

United States Court of Appeals, Tenth Circuit

September Term, 1971

Nos. 404–70, 405–70, 406–70

ROBERT W. PARKER, ET AL., APPELLEES

v.

UNITED STATES OF AMERICA; CLIFFORD HARDIN, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES; EDWARD P. CLIFF, INDIVIDUALLY AND AS CHIEF, UNITED STATES FOREST SERVICE; DAVID S. NORDWALL, INDIVIDUALLY AND AS REGIONAL FORESTER; JAMES O. FOLKESTAD, INDIVIDUALLY AND AS SUPERVISOR, WHITE RIVER NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE; KAIBAB INDUSTRIES, AN ARIZONA CORPORATION; AND WESTERN WOOD PRODUCTS ASSOCIATION, INTERVENOR, APPELLANTS

Appeals from the United States District Court for the District of Colorado

Jacques B. Gelin, Department of Justice, Washington, D.C. (*Walter Kiechel, Jr.*, Acting Assistant Attorney General; *James L. Treece*, United States Attorney; *James R. Richards*, Assistant United States Attorney; *S. Billingsley Hill* and *Nelson H. Grubbe*; were with him on the brief) for Appellant, United States of America.

Thomas J. Trimble, Phoenix, Arizona, (*Donald C. McKinlay* was with him on the brief) for Appellant, Kaibab Industries.

H. Anthony Ruckel and *Donald M. Carmichael*, Denver, Colorado, (*William A. Hillhouse, II* and *Tom W. Lamm* were with them on the brief) for Appellees.

H. Anthony Ruckel for Appellee, Colorado Open Space Council, and for Appellees *Robert W. Parker*, et al.; *John W. Young* and *Richard D. Lamm* on brief for Environmental Defenders, Inc. and *Howard Gelt* on brief for Colorado Environmental Legal Services, Amici Curiae.

James P. Rogers, Portland, Oregon, (*John Tippit* was with him on the brief) for Appellant-Intervenor, Western Wood Products Association; and *Noble K. Gregory and George A. Sears*, on the brief for Western Lumber Manufacturers, Inc., Amici Curiae.

Before LEWIS, Chief Judge, PICKETT and ADAMS,* Circuit Judges.

LEWIS, *Chief Judge:* This appeal is taken by the United States, the Secretary of Agriculture, certain named subordinate federal officials, an intervenor, and Kaibab Industries, a lumber company, from a judgment of the District Court for the District of Colorado enjoining the federal appellants and their contractor, Kaibab, from performing a contract of sale and harvest of designated timber located on public lands in the state of Colorado. The subject lands adjoin but are not contained within the bounds of a designated primitive or wilderness area and thus the case presents issues of first impression requiring interpretation of the Wilderness Act of September 3, 1964, 78 Stat. 890 and particularly section 3(b) of the Act, 16 U.S.C. § 1132(b) which provides:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation

* Of the Third Circuit, sitting by designation.

as wilderness, each area in the national forests classified on September 3, 1964, by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. . . . *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.* Notwithstanding any other provisions of this chapter, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range—Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest. [Emphasis added.]

The judgment of the district court has multiple effects:

(1) It determines as a fact that the timber contract pertains to an area, the East Meadow Creek Area of White River National Forest, that is predominantly of wilderness value and contiguous to the Gore Range-Eagles Nest Primitive Area; (2) it enjoins the sale and harvest of timber in the East Meadow Creek Area of White River National Forest until a determination is made by the President and Congress regarding the area's inclusion in a wilderness area to be created from the Gore Range-Eagles Nest Primitive Area and suitable contiguous lands; (3) it requires that the East Meadow Creek Area, because of its wilder-

ness character and contiguousness to the Gore Range-Eagles Nest Primitive Area, be included in the wilderness study report of the Secretary of Agriculture to the President and Congress. The memorandum opinion of the trial court is found at 309 F. Supp. 593. Appellants contend the judgment must fail for lack of jurisdiction, characterizing the injunction as an unauthorized interference with a discretionary management function authorized by Congress and stemming from an unconsented suit against the United States. Kaibab and interested lumber interests add the contention that appellees have failed to exhaust their administrative remedies.

The cases defining and interpreting the extent and limitations on judicial review of administrative decisions are multitudinous but have recently been brought into proper perspective with remarkable clarity by the Supreme Court in Citizens to Preserve *Overton Park, Inc. v. Volpe*, 401 U.S. 402. We there learn that administrative decisions such as the one here considered are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701, unless specifically prohibited by the Congress or falling within the "narrow exception" of agency action committed to the wide discretion of the administrative body by law as evidenced by clear congressional intent. *Citizens to Preserve Overton Park, supra* at 410. This "wide" discretion within the agency is never judicially unapproachable when there is "law to apply." *Id.* at 410.

We have no difficulty in recognizing the general purpose of the Wilderness Act. It is simply a congressional acknowledgement of the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man, usually commercial in nature, and the enactment of a

"proceed slowly" order until it can be determined wherein the balance between proper multiple uses of the wilderness lies and the most desirable and highest use established for the present and future. A concerned Congress, reflecting the wishes of a concerned public, did by statutory definition choose terminology that would seem to indicate its ultimate mandate.

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable is preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c)

Having initially established by definition that a wilderness cannot remain a wilderness if man invades and remains, the Act made at least three further provisions pertinent to our case. It designated the Gore Range-Eagles Nest Primitive Area, and other comparable areas, a preserved wilderness subject to some exceptions not here involved. It required the Secretary of Agriculture, through 16 U.S.C. § 1132(b), to

review and report as findings to the President, and within a time certain, the suitability or nonsuitability of all such areas for preservation as wilderness within the National forests. In turn, the President was directed to advise the Congress of his recommendations on the subject *but*, as earlier emphasized in our citation of this section, the President was not to be bound by the action of the Secretary or findings of the Secretary and could recommend that the designated primitive areas be enlarged by the addition of contiguous areas predominantly of wilderness value.

Appellants do not attack the finding of the trial court, as such, that the East Meadow Creek Area is of wilderness value. And, indeed, the finding is supported by the record considered under any standard of appellate review. *See* 309 F. Supp. 593, 601. But of course such finding has no significance unless there is "law to apply," in that 16 U.S.C. §1132(b) clearly means that the President and Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation. The lumber industry appellants do attack the trial court's designation of the contract lands as "contiguous" to the preserved wilderness area by pointing out that the Forest Service, after listening to various protests concerning the original contract contemplated with Kaibab, reduced the number of board feet in the proposed contract and in so doing preserved a bumper area between East Meadow Creek and the Gore Range-Eagles Nest Primitive Area. We are not impressed with this contention. The preservation of a "bumper" area does not probe the basic question presented, merely serves to lessen the impact of the agency action, and does not justify such action if otherwise prohibited. We reject this contention as dispositive of our issue.

Because this case is one of first impression, all appellants very properly set out the legislativ history of the Wilderness Act as an argumentative premise that the Act was not intended to constitute a drastic cutback in the discretionary management judgment of the concerned administrative agencies and that the Act was intended to supplement and not supplant the Multiple Use-Sustained Yield Act of June 12, 1960, 16 U.S.C. § 528, *et seq.* And, indeed, the legislative history of the Act does reflect constant reassurance to lumber, grazing, and other such interests by many informed members of Congress that the legislation does not and cannot adversely affect their legitimate interests. However, these portions of the legislative history would appear to be directed to those provisions of the Act which locked in the statutory designated wilderness areas for a time, in most instances certain, and which were already unavailable for commercial development under existing administrative policy and rulings. Since the Act only accepted as wilderness those areas then designated and did not extend the designation, wilderness remained unaffected by the statute and any concern of commercial interests in that regard was not warranted. We accept the legislative history of the Act as indicating reassurance of current administrative policy regarding existing wilderness areas and reassurance to commercial interests that no change was contemplated to their then existing potentials. So, too, we accept the legislative history of the Act as indicating its terms should not be interpreted as a general curtailment of agency discretion in the normal day-by-day administration of the national forests, parks or other public lands. But we find nothing in the Wilderness Act as written or in its legislative history in formulation that would support an ambiguity in word or intent

dictating an error in the interpretation of section 1132(b) as made by the trial court.

It is, of course, a cardinal rule of statutory construction that effect should be given to every provision of a statute, *Salt Lake County v. Utah Copper Co.*, 10 Cir., 93 F2 127, 133. Should we, in the case at bar, concede to federal appellants the discretionary right to destroy the wilderness value of the subject area, one contiguous to a designated wilderness, we would render meaningless the clear intent of Congress expressed in 16 U.S.C. § 1132(b) that both the President and the Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation. This statutory limitation on agency discretion is, of course, a narrow one dictated by necessity as contained in the definition of wilderness and by the specifics of the statutory words creating the limitation.

The third and final aspect of the trial court's injunction affirmatively requires the federal appellants to include its study of the East Meadow Creek Area in its report to the President and Congress. Justification for this requirement is found in the regulations of the Forest Service itself.

The Forest Service, rather than include its detailed regulations in the Code of Federal Regulations, maintains the Forest Service Manual (FSM). The section of the regulations which is most helpful in the construction of 16 U.S.C. § 1132(b) is FSM § 2321(1):

> Each Primitive Area (so classified as of September 3, 1964) *and contiguous lands which seem to have significant wilderness resources* will be studied to determine whether to recommend that all or part should be included in

the National Wilderness Preservation System. [Emphasis added.]

Following ESM § 2324(1) are lengthy and detailed directives describing the manner in which studies are to be made, listing the factors to be considered in making recommendations, giving instructions for conducting public hearings, and recognizing that the duty of the Forest Service is to study and recommend and that the President and Congress are to make the final determinations. The regulations contain not just one, but many, references to the study of contiguous areas of significant wilderness value. It seems clear from the Forest Service's regulations that its construction of the Wilderness Act is in full accord with the decision of the court below. Indeed, the testimony and exhibits offered at trial show that the Forest Service has scrupulously adhered to the regulations and the statutory scheme in other wilderness reviews and recommendations. A review of the exhibits offered at trial shows numerous recommendations for addition of contiguous areas to the primitive areas for final wilderness classification.

The trial court, having determined as a fact that the East Meadow Creek Area had predominantly wilderness value which should be preserved for consideration at the executive and congressional level, was completely justified in directing inclusion of a study of the area in the mandated report to the President. This requirement in no way directs or limits the Secretary in his full discretionary right to make such recommendation to the President as he may deem proper.

We conclude, as did the trial court, that 16 U.S.C. § 1132(b) sets out "law to apply" under the facts of the case at bar and hold that consequently this ac-

tion and the judgment neither constitute an unauthorized suit against the United States nor an unjustified judicial interference with the management powers of federal appellants.

As earlier indicated, the lumber industry appellants (but not federal appellants) assert that appellate review in the case should be rejected because appellees failed to exhaust administrative remedies before instituting the action. The decision to contract with Kaibab to harvest the East Meadow Creek Area was made by the Regional Forester. Applicable regulations provide for an administrative appeal from such decisions to the Chief of the Forest Service. From the decision of the Chief an appeal is available to the Secretary of Agriculture. 36 C.F.R. 211.20 *et seq.* It is undisputed that the plaintiffs did not pursue their right of appeal through the prescribed administrative process.

The issue of exhaustion of administrative remedies is raised for the first time on appeal and should therefore be given no consideration by this court, *Stephens Industries, Inc.* v. *Haskins & Sells*, 10 Cir., 438 F2 357, unless favorable consideration of the issue defeats jurisdiction. *Seidenbach's* v. *Bland Terry Shoe Corp.*, 10 Cir., 292 F2 206, *cert. denied*, 368 U.S. 933. We can conceive of no legal nor logical reason why the doctrine of exhaustion of administrative remedies should be applied in this case at this late date. The reasons are many and manifest: There is no legislative mandate requiring such exhaustion; the dispositive issue is one of pure law requiring no application of administrative expertise, *see Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557; *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426; the desir-

ability of saving judicial time through insistence on administrative exhaustion is no longer applicable and would now amount to a mockery; the record clearly reflects that the administrative decision was informally considered through all levels of the appropriate agencies; the doctrine is applied for the benefit of orderly procedure in the administrative and judicial process and not for the benefit of third parties.

The judgment is affirmed.

APPENDIX B

SEPTEMBER TERM—OCTOBER 1, 1971

NOS. 404-70, 405-70, 406-70

ROBERT W. PARKER, ET AL., APPELLEES

v.

UNITED STATES OF AMERICA; CLIFFORD HARDIN, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES; EDWARD P. CLIFF, INDIVIDUALLY AND AS CHIEF, UNITED STATES FOREST SERVICE; DAVID S. NORDWALL, INDIVIDUALLY AND AS REGIONAL FORESTER; JAMES O. FOLKESTAD, INIVIDDUALLY AND AS SUPERVISOR, WHITE RIVER NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE; KAIBAB INDUSTRIES, AN ARIZONA CORPORATION; AND WESTERN WOOD PRODUCTS ASSOCIATION, INTERVENOR, APPELLANTS.

Before Honorable DAVID T. LEWIS, Chief Judge; and Honorable JOHN C. PICKETT and Honorable ARLIN M. ADAMS (of the Third Circuit), Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

A true copy.
Teste:
HOWARD K. PHILLIPS,
Clerk, U.S. Court of Appeals,
Tenth Circuit.

By
HEIDE BARTHEL,
Deputy Clerk.

APPENDIX C

United States District Court, D. Colorado

Civ. A. No. C-1368

Feb. 27, 1970

ROBERT W. PARKER ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, CLIFFORD HARDIN, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES, EDWARD P. CLIFF, INDIVIDUALLY AND AS CHIEF, UNITED STATES FOREST SERVICE, DAVID S. NORDWALL, INDIVIDUALLY AND AS REGIONAL FORESTER, JAMES O. FOLKESTAD, INDIVIDUALLY AND AS SUPERVISOR, WHITE RIVER NATIONAL FOREST, UNITED STATES DEPARTMENT OF AGRICULTURE AND KAIBAB INDUSTRIES, AN ARIZONA CORPORATION, DEFENDANTS.

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, *District Judge:* This is a suit in which the plaintiffs seek to enjoin the defendants Secretary of Agriculture and the United States Forest Service from selling to the defendant Kaibab Industries 4.3 million board feet of Englemann Spruce, Lodgepole Pine and fir, which the defendant Kaibab proposes to cut and purchase from the United States. The sale area is in East Meadow Creek, which is part of the White River National Forest near Vail, Colorado. The plaintiffs are either residents and property owners at Vail, Colorado, or conservation organizations. The plaintiffs assert that the East

Meadow Creek area within which the Forest Service and Kaibab Industries propose to harvest the 4.3 million board feet of Engelmann Spruce, Lodgepole Pine and fir, is of such character as to qualify as wilderness under the 1964 Wilderness Act, 16 U.S.C., § 1131 et seq. Plaintiffs further allege that the decision of the defendants to sell the timber violates the letter and the spirit of the Wilderness Act together with the Forest Service's own regulations.

In essence the claim is that East Meadow Creek, which includes the proposed sale area, is contiguous to the Gore-Range Eagles Nest Primitive Region and that its character is substantially wilderness. Plaintiffs further assert that the defendants have not studied the area; that the Act and Forest Service regulations contemplate that there shall be a study; that the President and Congress shall have an opportunity to consider a contiguous area of the character of the present one for inclusion in an existing wilderness or primitive area; that the sale of the 4.3 million board feet plus the building of the necessary access roads and the harvesting and removal of the timber would irreparably destroy the wilderness character of this area.

This cause has been before the Court on the defendants' motion for summary judgment, 307 F. Supp. 685. This motion was denied and on that occasion we held that

> 1. There was jurisdiction over the subject matter;
>
> 2. Plaintiffs have standing to bring the suit;
>
> 3. The doctrine of sovereign immunity does not bar the action;
>
> 4. Plaintiffs should have an opportunity to present evidence as to the wilderness qualities of East Meadow Creek and their ecological interrelationship with the contiguous Gore Range-Eagles Nest Primitive Region.

Pursuant to this ruling a trial to the Court was had. Considerable evidence concerning the nature of the area has been received and the cause has been submitted for a decision. We are of the opinion that formal findings of fact and conclusions of law are unnecessary since the basis of our holding herein is primarily a matter of law. Necessary findings of fact will be set forth in narrative form.

The Gore Range-Eagles Nest Primitive Area has been classified as such by the Forest Service since June 19, 1931, long prior to the adoption by Congress of the Wilderness Act. It is located about 90 miles west of Denver within the Arapahoe and White River National Forests and has a total area of about 61,000 acres. Included within it is about 30 miles of the so-called Gore Range of mountains, which is regarded as one of the most inaccessible ranges within the State of Colorado. Mt. Powell, having an elevation of 13,534 feet, is located within the area, and there are said to be approximately 17 other peaks with elevations in excess of 13,000 feet. The elevations range from 8,500 feet to 13,500 feet, and the greater part of this region is classified as alpine. The East Meadow area is said to be sub-alpine. There are major streams and large lakes in the Gore area and a good many deer, elk, mountain sheep and small animals. There are no improvements other than a few abandoned cabins and temporary corrals. There are, however, extensive foot and horse trails maintained by the Forest Service.

East Meadow Creek area is, as we have indicated, contiguous to the Gore Primitive Region on the west. It consists of timbered valleys surrounded by timbered ridges. Within it are several parks, small grassy open areas, from one acre to fifty acres surrounded by trees. On the average, the elevation of the East

Meadow Creek region is about 10,000 feet, which is somewhat lower than the contiguous primitive area. It is located in what is known as the sub alpine life zone. It is situated so that it may be used as an access route into the Gore Primitive Area.

The proposed sale area is located within the East Meadow Creek basin, in the Piney Lake Compartment, Eagle River Block, Holy Cross Working Circle, White River National Forest. It consists of some 1,200 acres with an elevation between 9,200 and 10,500 feet. Deer and elk are found in the sale area throughout the summer and fall months and there is light recreation use in the region during the hunting season. The trees in the sale area consist mainly of Engelmann Spruce and Lodgepole Pine, some of which are as much as 350 years old, and fir, the age of which ranges up to 120 years.

The East Meadow Creek region is generally untrammeled by man except for an access road which runs to a point about three fourths of a mile inside the sale area. There is also a road known as the "bug road" which was constructed during the bark beetle control project in the early 1950's. This road is now blocked off and cannot be used by motorized vehicles. In some places the vegetation has camouflaged the "bug road" so that it is substantially unnoticeable. There are trails in the area.

The Denver Water Board is surveying, looking to possible use of the Meadow Creek drainage in connection with a water diversion project. There is also a possibility that a dam may be built at Piney Lake. These, however, are apparently in the early planning stages, and no definite decisions to undertake the projects have yet been made.

Substantial evidence has been presented as to the character of East Meadow Creek. The witnesses for

plaintiff have testified that it is wild in that it is inhabited by animals, is thickly wooded, secluded and unspoiled. Witnesses who are familiar with wilderness say that a wilderness experience can be obtained in this area and that it is fairly accessible. They have also testified that this is an important tourist attraction which is a great source of value to Vail and which brings enjoyment to the tourists who visit it during the spring, summer and fall of each year.

Defendants' evidence does not create any serious dispute concerning the essential character of this area. Rather, they contend that their access road of itself prevents East Meadow from being classified as either primitive or wilderness, and that mining claims plus Denver Water Board surveys plus their own positive plans for the area make it more suitable for timber harvesting than for wilderness use.

It is crystal clear from the evidence that the consummation of the present sale will effectively take all of East Meadow Creek out of contention as a primitive or wilderness addition.

The original decision to harvest timber in the East Meadow Creek sale area was made sometime in the late 1950's or early 1960's, prior to the adoption of the Wilderness Act. The road was planned prior to the Act and was completed in 1965. As of that time the Forest Service was committed to a sale of the timber. It looked to the sale to pay for the road and its extensions. A multiple use survey report on the proposed contract area was issued in 1967 and a sale area planning report was approved in 1968. The timber involved in the sale constitutes approximately 4.3 million board feet. About four miles of additional haul road, as well as most secondary and spur logging roads, would be, under the contract, constructed by the purchaser.

Throughout the 1960's, and even after the passage of the Wilderness Act, 16 U.S.C. § 1131 et seq., in 1964, the Forest Service considered the East Meadow Creek area as being governed solely by the Multiple Use Act, 16 U.S.C. § 528 et seq. The Wilderness Act was felt to be inapplicable because of the road which had been constructed in the sale area and also because of the plans of the Denver Water Board. On October 4, 1967, the Wilderness Workshop of the Colorado Open Space Coordinating Council submitted a "Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness (Gore Range-Eagles Nest Primitive Area) of Approximately 111,000 Acres," which proposal suggested that a large portion of the area contiguous to the Gore Primitive Region be classified as wilderness. This included much of East Meadow Creek, but excluded the East Meadow Creek Road (*see* map, Appendix I). On February 13, 1969, the Eagles Nest Wilderness Committee submitted a revision of the October 4, 1967 report. This revision recommended that East Meadow Creek be included as wilderness, but excluded both the East Meadow Creek Road and Piney Lake (*see* map, Appendix II). The Forest Service was unmoved by these proposals, making clear to the plaintiffs that East Meadow Creek would not be included in the study and report to the President and Congress on the Gore Primitive Area and that the proposed sale and harvesting of timber would proceed as planned. The plaintiffs then instituted the present suit.

The question presented is a limited and novel one. We are concerned not with whether the Secretary erred on his factual findings in ruling East Meadow Creek out as wilderness, but rather with whether there is sufficient evidence of its wilderness character so as to require study and submission to the President

and Congress for determination of its character and whether acts which would change its character should be enjoined until the determination can be made.

The concept of preserving certain public lands in their natural state did not originate in the Wilderness Act. For many years primitive, wilderness, and wild areas have been set aside by the Secretary of Agriculture and the Chief of the Forest Service.[1] Under the Multiple Use-Sustained Yield Act, 16 U.S.C. § 529, this authority of the Secretary of Agriculture to preserve wilderness was specifically recognized.[2] However, prior to the Wilderness Act, the issue of what areas should be designated as wilderness, wild or primitive, and what uses might be made of such areas was entirely within the discretion of the Secretary of Agriculture and the Forest Service. Thus, the administrative decisions with respect to the suitability of an area for wild, wilderness or primitive classification, the need for preserving the natural state of such an area, and the relative values of various resources in the particular area were final and unreviewable. One

[1] In 1939, the Secretary of Agriculture established procedures for designation of primitive areas in national forests. This was superseded in 1939 by regulations establishing procedures for designation of wilderness and wild areas. 36 C.F.R. 251.20–.21 (1967). Wilderness areas had to be in excess of 100,000 acres and could only be designated by the Secretary of Agriculture. Wild areas consisted of between 5,000 and 100,000 acres and could be designated by the Chief of the Forest Service. H.R. Rep. No. 1538 on the Wilderness Act. 2 U.S. Code Cong. & Adm. News pp. 3615, 3616 (1964).

[2] The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. * * * The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528–531 of this title. 16 U.S.C. § 529.

of the major purposes of the Wilderness Act was to remove a great deal of this absolute discretion from the Secretary of Agriculture and the Forest Service by placing the ultimate responsibility for wilderness classification in Congress. The House Report on the Wilderness Act recognizes this as the primary purpose for the Act:

> A statutory framework for the preservation of wilderness would permit long range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited.
>
> The committee accordingly endorses the concept of a legislatively authorized wilderness preservation system. Furthermore, by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over the public lands. H.R.Rep. No.1538 on the Wilderness Act, 2 U.S.Code Cong. & Adm.News at pp. 3646 47 (1964).

Congress has defined wilderness as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable;

> (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c).

We are called upon in this case to determine whether under the evidence presented there is a basis for determination by the President and Congress that the area in question is wilderness within the above definition. It is obvious, of course, that the area here involved does not encompass 5,000 acres. At the same time it is, as noted, contiguous to the Gore Range Wilderness Area which has been classified as such, and it is contended that the President and Congress should determine whether this contiguous area should be included.

See 16 U.S.C. § 1132(b) which provides as follows:

> The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. * * * *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.* [Emphasis added.]

With respect to primitive areas, this provision of the Act quite clearly reserves the decision to classify as wilderness to the President and ultimately Congress. The duty of the Secretary of Agriculture is to study and recommend, and this duty is mandatory.

East Meadow Creek, however, is not classified as a primitive region, but rather is *contiguous* to the Gore Primitive Area. With respect to such contiguous areas, the Act is less specific as to the division of responsibility between the Forest Service and Secretary of Agriculture on the one hand and the President and Congress on the other. Nevertheless, the last sentence of 16 U.S.C. § 1132(b) leaves no doubt that at least as to those contiguous areas which are predominantly of wilderness value, the decision to classify or not to classify them as wilderness *must remain open through the Presidential level.*

It follows from the above that

1. The Wilderness Act, § 1132(b), empowers the President to recommend to the Congress the addition of contiguous primitive area of national forest lands predominantly of wilderness value.

2. The Act contemplates that the President shall be in a position to exercise a meaningful decision with respect to contiguous areas.

3. The Act contemplates that the Secretary shall consider whether a contiguous area is to be included and that its determination is subject to review by the President and ultimately the Congress.

4. Where as here the contiguous area is shown by the evidence to have wilderness character, it thwarts the purpose and spirit of the Act to allow the Forest Service to take abortive action which effectively prevents a Presidential and Congressional decision.

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[2] We are fully aware of the provision in 16 U.S.C. § 1132(b)

These basic rules which we have outlined above are fully supported by the regulations set forth in the Forest Service Manual.[4] These regulations are designed to aid Forest Service personnel in carrying out their duties under the Wilderness Act.

Forest Service regulation 2321(1) provides that:

> Each Primitive Area (so classified as of September 3, 1964) *and contiguous lands which seem to have significant wilderness resources* will be studied to determine whether to recommend that all or part should be included in the National Wilderness Preservation System. (Emphasis added.)

This regulation is basically a definition of the duties imposed upon the Forest Service by § 1132(b) of the Wilderness Act. It requires that the Forest Service study "contiguous lands which seem to have significant Wilderness resources," and thus supports this Court's conclusion that the duties of the Forest Service under the Wilderness Act are not limited to merely studying the primitive areas.

Of course, not every area which is contiguous to a primitive region need be studied, but rather only those contiguous areas which "seem to have significant Wilderness resources." We consider this latter

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which states, "Areas classified on September 3, 1964 shall continue to be administered under the rules and regulations affecting such areas on September 3, 1964 until Congress has determined otherwise." Although this provision does vest some discretion in the Forest Service prior to the ultimate Congressional decision, we do not feel that it can or should be read so as to allow the Forest Service to change the basic character of the area. Such a broad reading of the above provision would allow the Forest Service to frustrate one of the major purposes of the Wilderness Act.

[4] Plaintiffs' Exhibit 1a, b & c.

phrase as referring to contiguous areas which meet the minimum condition of suitability for wilderness as defined in Forest Service regulation 2321.11(a) (which regulations are, of course, derived from the Act itself):

> 2321.11a *Minimum Conditions.* Most of the area must satisfy, and all of the area must be such that it can be made to satisfy, the definition of Wilderness as set forth in the Wilderness Act.
>
> 1. As an area where the earth and its community of life are untrammeled by man; where man himself is a visitor who does not remain.
>
> 2. As undeveloped land retaining its primeval character and influence, without human habitation or permanent improvements, except those that are necessary to meet the minimum requirements for administration and authorized use of the area.
>
> Generally appearing to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable.
>
> 3. As having outstanding opportunities for solitude or a primitive and unconfined type of recreation.
>
> May also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.
>
> 4. As normally having at least 5,000 acres of land. In rare instances an area may be smaller; but if so, it must be of sufficient size to make practicable its preservation and use in an unimpaired condition.

There are other criteria which must be met by primitive areas and areas contiguous to primitive regions alike before the Forest Service may give a positive recommendation to the President and Congress that the particular area be classified as wilderness. For example, both availability and need must

be considered. Forest Service Reg. 2321.1. Undoubtedly, as the Forest Service contends, the questions of availability and need are complex and require substantial expertise in the field of land use management for their resolution. Thus, they must be left largely to the discretion of the Forest Service.

However, we are not here concerned with the issue of whether or not the Forest Service must *recommend* East Meadow Creek for wilderness classification. Nor would we undertake to second guess the Secretary by a ruling that the area in question is wilderness. The only issue presented to this Court is whether the Forest Service must under the Act and its own regulations *study* East Meadow Creek, include that study in its report to the President and Congress, and refrain from acts such as the cutting of timber, which will irrevocably change its character, until the President and Congress have considered the report and rendered a decision. As stated in the Forest Service Manual, the answer to this question does not require a consideration of need or availability, but only a determination as to whether East Meadow Creek seems to possess the inherent qualities of suitability as wilderness. This determination, based as it is on substantially objective criteria set forth in both the Wilderness Act and Forest Service regulations, is as stated above largely a matter of law.

[1] The Forest Service has recognized this basic difference between the decision to study a particular region and the decision to make a positive recommendation that it be classified as wilderness. For example, in the Forest Service Report on the Flat Tops Wilderness, Plaintiffs' Exhibit 8a, several areas contiguous to the Flat Tops Primitive Area which had been suggested by interested groups for classification as wilderness were studied and included in the Forest Service Report, even though the Service ultimately determined not to recommend the areas as wilderness. *See also* Proposal for Mt. Jefferson Wilderness, Plaintiffs' Exhibit 8m.

Hence, we are not invading any Forest Service field of expertise. We simply hold that the Forest Service does not have uncontrolled discretion where the area is contiguous to wilderness lands and is shown to be primitive in character; that the determination must be preserved for the President and Congress; that it is not to be preempted. We, therefore, conclude that the issue as to whether a given contiguous area is suitable for wilderness classification, and hence must be studied and included in the Forest Service report to the President and Congress, is a question which is subject to judicial review.

Defendants contend that the East Meadow Creek region was included in a study made pursuant to the Multiple Use Sustained Yield Act, 16 U.S.C. § 528 et seq. and was found not qualified for primitive, wild, or wilderness classification. Thus, it is claimed that the Forest Service has in effect also fulfilled its duty under the Wilderness Act and any further study of East Meadow Creek would be duplicitous. Again, this argument mistakes the function of the Forest Service with respect to wilderness area under the Wilderness Act as compared with the Multiple Use Act. Under the Multiple Use Act, the authority to classify as wilderness, primitive, or wild was vested solely in the Secretary of Agriculture or the Forest Service, and the decision on these matters was based not only on suitability, but also on availability and need. Since the Wilderness Act requires a study and report on those regions contiguous to primitive areas which merely meet the test of suitability, the Forest Service's conclusions under the Multiple Use Act are not conclusive and indeed have little bearing on the question of whether East Meadow Creek must be included in the wilderness study report to the President and Congress.

In applying the criteria of suitability set forth in the Wilderness Act and Forest Service regulations to East Meadow Creek, we find that at least that portion of East Meadow Creek included in the Citizens' Preliminary Recommendation for the Establishment of the Eagles Nest Wilderness, First Revision, February 13, 1969, seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value. Outside of the presence of the East Meadow Creek Road, the area in question is untrammeled by man. The Citizens' Proposal does not include the East Meadow Creek Road, and the testimony indicated that due to the dense forest conditions, this road is substantially unnoticeable from approximately 100 yards away. There was also testimony that East Meadow Creek has outstanding opportunities for solitude and a primitive and unconfined type of recreation, including hunting, hiking, back-packing, and camping. Furthermore, this region is significantly interrelated with the Gore Primitive Area. Not only is it geographically contiguous to the Gore, but it also serves as an access route into the primitive area. Although East Meadow Creek and the Gore Primitive Area are in different life zones due to the differences in altitude, both regions are inhabited by deer and elk, and the testimony indicated a possibility that destruction of the natural state of East Meadow Creek might have an adverse effect on this wildlife. The evidence shows that it is desirable to have both alpine and sub-alpine zones within a wilderness area.

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[*] The Citizens' Proposal includes a significant portion of the proposed sale area encompassing partial cuts 6 and 12.

In conclusion, we hold that the East Meadow Creek region meets the minimum requirements of suitability for wilderness classification and must, therefore, be included in the study report to the President and Congress. Furthermore, we find that if the proposed sale and harvesting of timber proceeds, it will frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture. The Forest Service has been considering the proposed sale of timber in East Meadow Creek for several years. The decision to sell and harvest having now been made, the Service claims that the plans must proceed immediately. We must disagree. The interests of the plaintiffs and the public in maintaining the status quo until the requirements of the Act have been fulfilled far outweigh this desire to get the job done now after more than ten years of delay.

We are not unmindful of the interests and equities of Kaibab Industries, but here again we cannot give effect to this interest, for the cutting of the trees, is as we have noted, too final and conclusive. It must await the processes of law.

We conclude then that the cause is a proper one for equitable intervention. We determine that the preliminary injunction heretofore entered be continued indefinitely or until a determination has been made by the President and Congress that East Meadow Creek is predominantly wilderness in character and should be made part of Gore Range-Eagles Nest or that it should not be.

Plaintiffs will submit an appropriate judgment for the Court's signature.